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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

CHARLES E. JAMES,

Petitioner,

v.

VICTOR HERBERT, Superintendent, Attica Correctional Facility; ELIOT SPITZER, New York State Attorney General,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Second Circuit too narrowly interpret its ability to apply a *per se* rule requiring reversal of a criminal conviction where the defendant is represented at trial by an attorney who is implicated in the same criminal activity for which the defendant is on trial?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	viii
Opinions Below	1
Basis for Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	2
Reasons for Granting the Petition	6
I. The Sixth Amendment Requires Reversal of a Criminal Conviction Where a Defendant Has Been Denied Effective Assistance of Counsel	6
II. There is a Conflict Among the Circuits as to Whether a *Per Se* Rule Applies Where Defense Counsel is Implicated in Defendant's Crime, and Between the Illinois Supreme Court and Certain Courts of Appeals	7

Contents

	Page
III. Most Circuit Courts That Have Considered a Case in Which a Criminal Defendant's Attorney Faces Charges Relating to the Same Crime for Which Defendant Faces Trial Have Found that the Defendant Was Denied Counsel Within the Meaning of the Sixth Amendment	15
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases:

Armienti v. United States, 234 F.3d 820 (2d Cir. 2000) 9

Atley v. Ault, 191 F.3d 865 (8th Cir. 1999) 14

Caban v. United States, 281 F.3d 778 (8th Cir. 2002) 13, 14

Cerro v. United States, 872 F.2d 780 (7th Cir. 1989) 16

Cuyler v. Sullivan, 446 U.S. 335 (1980) 7, 13

Duncan v. O'Leary, 806 F.2d 1307 (7th Cir. 1986) ... 9, 10

Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1999) 15

Geders v. United States, 425 U.S. 80 (1976) 7

Gideon v. Wainwright, 372 U.S. 335 (1963) 7

Gov't of the Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984) 10, 16

Lipson v. United States, 233 F.3d 942 (7th Cir. 2000) 17

Lockhart v. Terhune, 250 F.2d 1223 (9th Cir. 2001) .. 14

Cited Authorities

Page

Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237 (2002) 7, 11, 13

People v. Cunningham, 107 Ill.2d 143, 89 Ill. Dec. 879, 481 N.E.2d 722 (1985) 10

People v. Washington, 101 Ill.2d 104, 77 Ill.Dec. 770, 461 N.E.2d 393 (1984), *cert. denied*, 469 U.S. 1022 9-10

Smith v. Hofbauer, 312 F.3d 809 (6th Cir. 2002) 11, 12, 13

Solina v. United States, 709 F.2d 160 (2d Cir. 1983) 6, 7

Strickland v. Washington, 466 U.S. 668 (1984) 7, 10

Taylor v. United States, 985 F.2d 844 (6th Cir. 1993) 10, 11

Thomas v. Foltz, 818 F.2d 476 (6th Cir.), *cert. denied*, 484 U.S. 870 (1987) 11

United States v. Arrington, 867 F.2d 122 (2d Cir. 1989) 9

United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984) 6, 8, 9, 16

Cited Authorities

Page

United States v. Cronic, 466 U.S. 648 (1984) 7

United States v. Fulton, 5 F.3d 605 (2d Cir. 1993) ... 6, 9

United States v. Garcia, 517 F.2d 272 (5th Cir. 1975) 10, 15

United States v. Greig 967 F.2d 1018 (5th Cir. 1991) 10, 16

United States v. Knight, 680 F.2d 470 (6th Cir. 1982) 16

United States v. Marcano-Garcia, 622 F.2d 12 (1st Cir. 1980) 16

United States v. Mitchell, 216 F.3d 1126 (D.C. Cir. 2000) 15

United States v. Montana, 199 F.3d 947 (7th Cir. 1989) 16

United States v. Mouzin, 785 F.2d 682 (9th Cir. 1986) 10

United States v. Novaton, 271 F.3d 968 (11th Cir. 2001) 15

United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995) 16

Cited Authorities

	Page
United States v. Salinas, 618 F.2d 10092 (5th Cir. 1980)	15-16
United States v. Snyder, 707 F.2d 139 (5th Cir. 1983)	10
United States v. Wallace, 276 F.3d 360 (7th Cir. 2002)	16
United States v. White, 706 F.2d 506 (5th Cir. 1983)	10
Whitney v. Stewart, 175 A.D.2d 674, 572 N.Y.S.2d 597 (4th Dept. 1991)	5
United States Constitution:	
U.S. Const. amend. VI	1, 6, 7, 15, 17
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2254	2
28 U.S.C. § 2254(a)	2
28 U.S.C. § 2254(d)	6
28 U.S.C. § 2254(d)(1)	2
28 U.S.C. § 1331	3
N.Y. Crim Proc. Law § 440.10	5
N.Y. Crim Proc. Law § 440.20	5

TABLE OF APPENDICES

Page

Appendix A — Summary Order Of The United States Court Of Appeals For The Second Circuit Dated And Filed February 13, 2003 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Western District Of New York Dated May 29, 2002 ..... 6a

OPINIONS BELOW

The summary order of the United States Court of Appeals was dated February 13, 2003. (App. A) (*James v. Herbert*, No. 02-2389, (2d Cir., Feb. 13, 2003), 57 Fed. Appx. 894, 2003 WL 328803) The memorandum and order of the United States District Court for the Western District of New York was dated May 29, 2002. (App. B)

BASIS FOR JURISDICTION

This is a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit, seeking review of a summary order of that Court dated February 13, 2003. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

> The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

28 U.S.C. § 2254(d)(1).

STATEMENT OF THE CASE

Petitioner, Charles E. James, who is currently incarcerated by the State of New York, brought this action under 28 U.S.C. § 2254, in U.S. District Court for the Western District of New York, alleging, *inter alia,* that his Sixth Amendment right to effective assistance of counsel was violated by virtue of his trial counsel's conflict of interest

arising from the attorney's prosecution for obstruction of justice in connection with Petitioner's arrest. The District Court had jurisdiction over Petitioner's claim pursuant to 28 U.S.C. § 1331.

According to his own testimony, on the night of October 9, 1987, James broke into the home of his estranged wife, confronted his wife and her lover, struck his estranged wife, and engaged in a physical altercation with the lover, during which the lover sustained multiple stab wounds, ultimately resulting in the lover's death. After the incident, James drove to his brother's house and telephoned the attorney who subsequently represented James at trial: Douglas W. Whitney, Esq.

Whitney met James at James' brother's house, where they discussed the situation. Whitney took the weapon from James and placed it in his own car, after which James never saw the knife again. Whitney also instructed James to wash his face and hands, and change his clothing. Whitney told James not to disclose what he had done with the knife and his clothing.

Whitney, James and James' brother then drove to James' house, where James and Whitney were both arrested by Sheriff's Deputies who had responded to a call from James' estranged wife and discovered the victim's body. James was charged with murder; Whitney was charged with obstructing governmental administration.

James was indicted by an Ontario County Grand Jury on seven counts: two counts of murder, three counts of burglary, and two counts of assault. Whitney was prosecuted in Ontario County on the charge of obstructing governmental

administration. The criminal proceeding against Whitney was adjourned from December 1987 until after the conclusion of James' trial.

James, represented by Whitney, was tried by an Ontario County jury in late April, 1988. James complied with Whitney's instructions not to disclose what happened to the weapon and his bloody clothes throughout the course of the proceedings in state court.

During the course of Whitney's representation of James, in New York State Supreme Court, Whitney repeatedly reinforced his instructions to James to say that he had lost the knife at the crime scene, and to not disclose what he had done with his clothing. James took the stand to testify concerning, *inter alia,* his emotional state on the night of the assaults, in an effort to establish a defense of extreme emotional disturbance to the intentional murder charge. Acting on Whitney's advice, James testified falsely concerning his knowledge of the whereabouts of the weapon and the clothing he had been wearing at the time of the assaults.

The jury found James not guilty of intentional murder and one second degree assault charge, but guilty of first degree manslaughter as a lesser included offense, felony murder, three counts of burglary, and two counts of assault, one of which was a lesser included offense of the charged crime. James was sentenced to an indeterminate term of 24 years to life.

The governmental obstruction charge against Whitney was dismissed after a trial. Whitney subsequently commenced a civil action against the Ontario County Sheriff for wrongful

arrest, which was later dismissed for failure to prosecute. *Whitney v. Stewart*, 175 A.D.2d 674, 572 N.Y.S.2d 597 (4th Dept. 1991).

James moved to vacate his conviction in the trial court pursuant to N.Y. Crim Proc. Law §§ 440.10 and 440.20 in May 1994, on the basis, *inter alia*, that Whitney's conflict of interest deprived James of effective representation, both due to Whitney's inability to effectively advise James, and because the fact that James was knowingly and intentionally lying on cross-examination severely undermined James' credibility before the jury. The § 440 motions were denied, and leave to appeal to the Supreme Court Appellate Division was also denied.

James perfected the appeal of his conviction to the Appellate Division in May 1998. The Appellate Division affirmed in December 1998, and leave to appeal to the New York Court of Appeals was denied in March 1999. The instant proceeding was commenced in U.S. District Court in February 2000.

The matter was referred to U.S. Magistrate Judge H. Kenneth Schroeder for a Report and Recommendation. Respondent, represented by the Attorney General of the State of New York, answered the petition. The Magistrate Judge recommended that the petition be denied. Petitioner filed timely objections to the Report and Recommendation, and, after oral argument, District Judge John T. Elfvin overruled the objections, adopted the Report and Recommendation, and dismissed the petition, granting a certificate of appealability solely on the conflict of interest claim.

James appealed to the Court of Appeals for the Second Circuit, arguing that his defense attorney had a *per se* conflict of interest with James resulting from the attorney's involvement in the crime for which James was tried, and that such conflict of interest deprived James of his right to counsel under the Sixth Amendment, thus requiring reversal of James' conviction.

The Court of Appeals noted that "James's ineffective assistance of counsel claim finds arguable support in precedents of this Court." 2003 WL 328803 at *1 (citing *United States v. Fulton,* 5 F.3d 605, 612 (2d Cir. 1993); *United States v. Cancilla,* 725 F.2d 867, 867 (2d Cir. 1984); and *Solina v. United States,* 709 F.2d 160, 161, 168 (2d Cir. 1983)). However, the Court held that the petition was barred by 28 U.S.C. § 2254(d). *Id.* at *2.

Because there is a conflict among the Circuits, and between certain of the Circuits and the Illinois Supreme Court, Petitioner seeks a writ of certiorari to resolve this important matter.

REASONS FOR GRANTING THE PETITION

I. The Sixth Amendment Requires Reversal of a Criminal Conviction Where a Defendant Has Been Denied Effective Assistance of Counsel

Although the general rule requires that a criminal defendant must typically show that defense counsel's deficiencies or errors had an effect on the judgment in order to prevail on a Sixth Amendment claim of ineffective assistance of counsel, this Court has presumed prejudice where a defendant is actually or constructively denied counsel

altogether, or where the State has interfered with counsel's assistance. *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (citing *United States v. Cronic,* 466 U.S. 648, 659 (1984)). *See also Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 1240-41 (2002) (citing *Cronic, supra*, 466 U.S. at 658-59; *Geders v. United States,* 425 U.S. 80, 91 (1976); *Gideon v. Wainwright*, 372 U.S. 335, 344-345 (1963)).

The Court has also found that a "similar, though more limited, presumption of prejudice" is warranted where "counsel is burdened by an actual conflict of interest." *Strickland, supra*, 466 U.S. at 692, (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)).

II. There is a Conflict Among the Circuits as to Whether a *Per Se* Rule Applies Where Defense Counsel is Implicated in Defendant's Crime, and Between the Illinois Supreme Court and Certain Courts of Appeals

The Court of Appeals for the Second Circuit first articulated a *per se* conflict of interest rule in *Solina v. United States,* 709 F.2d 160 (2d Cir. 1983). In that case, the defendant learned after his conviction that his "attorney," although possessed of a law degree, and having substantial legal experience in administrative proceedings was not admitted to the bar of any jurisdiction. Although acknowledging that the representation Solina received was equal to that provided by many licensed attorneys, and further acknowledging that the evidence against Solina was overwhelming, the Court reversed Solina's conviction. *Id.* at 165. Having considered the historical underpinnings of the Sixth Amendment's right to "counsel," the Court held that where an accused is denied his right to counsel, "harmless error" analysis cannot apply, and the conviction must be reversed. *Id.* at 169.

One year later, the Second Circuit Court of Appeals expanded the applicability of the *per se* rule to a case in which one of two co-defendants' counsel was accused of participating in a conspiracy involving a co-conspirator of the defendants' in a scheme similar to the scheme for which the defendants were on trial. *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984). The Court held:

> We conclude with a similar lack of enthusiasm that the principle of *Solina* applies to the personal conflict of interest of Cancilla's trial counsel and requires us to reverse the judgment of the district court. As noted, the government asks us to assume for the purpose of this appeal that Cancilla's trial counsel committed crimes with a possible co-conspirator of Cancilla similar to those for which Cancilla was on trial and that Cancilla was unaware of this. But with the similarity of counsel's criminal activities to Cancilla's schemes and the link between them, it must have occurred to counsel that a vigorous defense might uncover evidence or prompt testimony revealing his own crimes, even more so than in *Solina*. It is noteworthy that Cancilla, on advice of his counsel, chose not to present a defense. Moreover, representation of Cancilla in ways other than by a vigorous defense may have been affected. It is difficult to see how counsel conflicted in this way could impartially have given Cancilla advice on whether or not to take a guilty plea, since counsel might have feared that acceptance of a plea would turn on Cancilla's cooperation, which might lead to discovery of the link to counsel's own activities. In such circumstances, proof of this type of

> conflict, which the government here asks the court to assume, constitutes under *Solina* a per se violation of the Sixth Amendment right to effective assistance of counsel.
>
> * * * *
>
> *What could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities*? The government appears to recognize this in describing the rationale of *Solina* as "the danger that the person acting as a lawyer might fear that a vigorous defense might cause the court or the government to inquire into his background and learn of his criminal activity." As indicated above, there were similar, probably greater, dangers here because the very evidence at trial or in plea negotiations might well lead to discovery of the attorney's prior criminal activity.

Id. at 870 (emphasis added).

The Court of Appeals for the Second Circuit has applied the *per se* rule infrequently on subsequent occasions, and only where it found "egregious conduct" such as in *Solina* and *Cancilla. See also United States v. Arrington*, 867 F.2d 122 (2d Cir. 1989); *United States v. Fulton,* 5 F.3d 605 (2d Cir. 1993); *Armienti v. United States*, 234 F.3d 820 (2d Cir. 2000).

Like the Court of Appeals for the Second Circuit, the Supreme Court of Illinois applies a *per se* standard to attorney conflict of interest cases. *Duncan v. O'Leary*, 806 F.2d 1307, 1313 (7th Cir. 1986) (citing *People v. Washington*, 101 Ill.2d

104, 77 Ill.Dec. 770, 461 N.E.2d 393 (1984), *cert. denied*, 469 U.S. 1022; *People v. Cunningham*, 107 Ill.2d 143, 89 Ill. Dec. 879, 481 N.E.2d 722 (1985)).

However, the Seventh Circuit Court of Appeals, has explicitly rejected a *per se* rule, *Id.*, as have the Sixth Circuit Court of Appeals, *Taylor v. United States*, 985 F.2d 844, 846 (6th Cir. 1993); and the Ninth Circuit Court of Appeals, *United States v. Mouzin*, 785 F.2d 682, 697-99 (9th Cir. 1986).

The Court of Appeals for the Third Circuit has held that, "[I]n certain sixth amendment contexts, prejudice is presumed from the circumstances." *Gov't of the Virgin Islands v. Zepp*, 748 F.2d 125, 132 (3d Cir. 1984) (referencing *Strickland v. Washington*, 466 U.S. 668(1984)). The Court further held that "[I]n order for the defendant to make out a violation of her sixth amendment rights, she must establish that an actual conflict of interest adversely affected counsel's performance but she need not demonstrate actual prejudice" *Id.* at 134.

The Fifth Circuit Court of Appeals has articulated a "policy to preserve the integrity of the judicial system" *United States v. Greig* 967 F.2d 1018, 1023-24 (5th Cir. 1991), pursuant to which it has reversed convictions where defense counsel participated in his clients' escape from jail. *Id.* (citing *United States v. White,* 706 F.2d 506 (5th Cir. 1983); *United States v. Snyder*, 707 F.2d 139 (5th Cir. 1983)). The Court of Appeals remanded Greig for a new trial because of "the district court's failure to hold a [*United States v.*] *Garcia*[, 517 F.2d 272 (5th Cir. 1975)] hearing after learning counsel had an actual conflict of interest, which later adversely affected his performance." *Id.*

The Court of Appeals for the Sixth Circuit has previously "specifically . . . rejected a *per se* rule as to conflicts of interest and requires proof of an actual conflict." *Taylor v. United States*, 985 F.2d 844 (6th Cir. 1993) (citing *Thomas v. Foltz*, 818 F.2d 476, 480-81 (6th Cir.), *cert. denied*, 484 U.S. 870 (1987)). However, when confronted with a request to apply a *per se* rule to a situation in which defendant's counsel was indicted on a drug charge three weeks after defendant's arraignment, and took a plea approximately one month after defendant's guilty verdict, but before sentencing, the Court held:

> Because the question of whether the *Sullivan's* lessened standard of proof for a claim of ineffective assistance of counsel based upon an attorney's conflict of interest for anything other than joint representation remains an "open question" in the jurisprudence of the Supreme Court, and in fact was an open question at the time Petitioner's case was heard, Petitioner's claim fails because it is not based upon clearly established Supreme Court precedent as mandated by AEDPA.

Smith v. Hofbauer, 312 F.3d 809, 817 (6th Cir. 2002) (citing *Mickens*, *supra*, 122 S. Ct. at 1246).

The dissenting judge argued that the case should have been remanded to the district court for an evidentiary hearing:

> Supreme Court decisions clearly established long ago that a person ". . . charged with crime . . . requires the guiding hand of counsel at *every step in the proceedings against him*", and that the "right to counsel is the right to the effective

assistance of counsel". It is also clear that the right to effective assistance of counsel applies at the plea stage of the proceedings. "[E]ven when there is a bona fide defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." Finally, highly relevant to the circumstances here, Supreme Court decisions teach that "an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."

* * * *

Obviously, *Cuyler* is clearly established and relevant Supreme Court law. But it is not the totality of it. The reality is that conflicts come in all shapes and sizes, only one of which is joint representation. In my view, and critical to my analysis of the present case, the Supreme Court's decision in *Holloway* clearly established the ultimate, functionally governing, legal rationale for federal habeas review for any convicted defendant represented in state court by conflicted counsel, not merely joint representation. As the Court explained there, "[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . [T]he evil is in what the advocate finds himself compelled to *refrain* from doing, not only at trial, but also as to possible pretrial plea negotiations and in the sentencing process."

> The foregoing considered, I believe that, even though Balgooyen's conflict is not on "all fours" with the joint representation at issue in *Cuyler*, it is even more "suspect." It had a stronger tendency to influence, if not compel, him to refrain from actions potentially advantageous to his client that an effective counsel would take. That tendency should have aroused the District Court's serious suspicions and prompted it to examine the entire state court record with heightened scrutiny.

Id. 824-25 (citations omitted).

In a recent pre-*Mickens* decision, the Court of Appeals for the Eighth Circuit, argued for a limitation of *Cuyler*'s "almost *per se* rule of prejudice" to cases where there is a conflict between codefendants or serial defendants that was not brought to the attention of the trial court. *Caban v. United States*, 281 F.3d 778, 781-82 (8th Cir. 2002). Notwithstanding its holding that a conflict of interest between a defendant and another client of the defendant's attorney did not violate the defendant's right to counsel, *Id.* 785-86, the Court acknowledged that:

> where the trial court is made aware of a potential conflict of interest before, during, or in some instances, after trial . . . the trial court has a duty to conduct a searching inquiry into the possibility of a constitutional violation arising from that conflict. Failure to undertake this inquiry mandates an automatic reversal of any conviction "upon a showing of possible prejudice." This per se rule of reversal applies regardless of the nature of the conflict.

Id. at 781 (citing *Atley v. Ault*, 191 F.3d 865, 873 (8th Cir. 1999)) (other citations omitted).

The Ninth Circuit Court of Appeals has held in the context of a multiple representation case that:

> A criminal defendant's Sixth Amendment right to counsel includes the right to be represented by an attorney with undivided loyalty. This guarantee is so important that, unlike with other Sixth Amendment claims, when a defendant alleges an unconstitutional actual conflict of interest, "prejudice must be presumed," and harmless error analysis does not apply.

Lockhart v. Terhune, 250 F.2d 1223, 1226 (9th Cir. 2001). In *Lockhart*, the Court noted that because the petitioner raised the conflict of interest for the first time on appeal, he was required to "demonstrate that an actual conflict adversely affected his lawyer's performance." *Id.* at 1230. The Court also held:

> Lockhart identifies a number of actions and inactions that adversely affected his defense and that "likely" can be attributed to Hove's conflict of interest. . . . Because of the conflict of interest, however, Hove was unable to exploit this defense fully. We can discern no tactical justification for Hove's decisions and, therefore, conclude that he was likely motivated by a desire to protect his other client. This is sufficient to satisfy the "adverse effect" prong of the conflict of interest test. The state appellate court's decision that Lockhart did not meet his burden was contrary to clearly established federal law.

Id. at 1231-32 (citations omitted).

In *United States v. Novaton*, 271 F.3d 968 (11th Cir. 2001), the defendant argued that one of his trial attorneys labored under a conflict of interest by continuing to represent him when there was a possibility that the attorney was under investigation by the prosecutor in connection with a different case. The Court of Appeals for the Eleventh Circuit, noting that the rule of that Circuit involved an application of the *Cuyler* two-part test, *Id.* at 1010 (citing *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999) (en banc)), held that "even if we assume that an actual conflict of interest existed between Cuni and his attorney, we agree with the district court's alternative holding that Cuni has not, and cannot, show his attorney's performance was "adversely affected" by the conflict." *Id.* at 1011.

The District of Columbia Circuit has applied a *per se* rule, but only to cases where a defendant is represented by a person never properly admitted to any bar. *United States v. Mitchell*, 216 F.3d 1126 (D.C. Cir. 2000).

III. Most Circuit Courts That Have Considered a Case in Which a Criminal Defendant's Attorney Faces Charges Relating to the Same Crime for Which Defendant Faces Trial Have Found that the Defendant Was Denied Counsel Within the Meaning of the Sixth Amendment

In only a very small number of reported cases from the Courts of Appeals has the precise factual pattern presented in this case been at issue: a defendant is represented by an attorney who faces criminal or disciplinary proceedings for conduct directly related to the crime for which the defendant is on trial. In nearly all the reported cases, the Courts have determined that there was an unwaivable conflict between the defendant and the attorney. *United States v. Salinas*,

618 F.2d 10092 (5th Cir. 1980) (affirming trial judge's order disqualifying attorney who was "target" of investigation concerning events for which client was indicted); *Cancilla, supra* (defense counsel may have conspired with participant in defendant's scheme on similar fraudulent insurance claims involving cars owned by the lawyer); *Zepp*, *supra*, (counsel was accused of concealing evidence of defendant's crime); *Greig*, *supra*, (defendant's attorney attempted to influence a co-defendant represented by other counsel to refuse a guilty plea).

In two of the cases where the Court refused to find a Sixth Amendment violation, the defendants were also represented by additional counsel, *United States v. Marcano-Garcia*, 622 F.2d 12 (1st Cir. 1980); or counsel had already been tried, convicted and served time. *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995). Where the defense attorneys, although subjects of an investigation concerning theft of evidence, were unaware of the investigation, and were subsequently found not to have stolen the documents, a Court of Appeals has found that there was no conflict of interest. *United States v. Knight*, 680 F.2d 470 (6th Cir. 1982).

In *United States v. Wallace*, 276 F.3d 360 (7th Cir. 2002), the government successfully moved to disqualify defense counsel on the ground that counsel had attempted to suborn perjury in preparation for sentencing hearing. *Id.* at 364. Although relying on its prior holdings in *Cerro v. United States*, 872 F.2d 780 (7th Cir. 1989) and *United States v. Montana*, 199 F.3d 947 (7th Cir. 1989) for the proposition that the *Cancilla per se* rule does not apply in the Seventh Circuit, the Court acknowledged that, "If the trial judge knew or should have known that a potential conflict of interest

existed and did not adequately address the issue with the defendant, then we will presume prejudice." *Id.* at 366-67 (citing *Lipson v. United States*, 233 F.3d 942, 945 (7th Cir. 2000).

Thus, notwithstanding several Circuits' articulated rejection of a *per se* rule requiring automatic reversal, it appears that most of the Circuits that have considered claimed Sixth Amendment violations similar to Petitioner's have, in fact, treated the situations as demonstrating a *per se*, unwaivable violation of the Sixth Amendment.

CONCLUSION

This petition presents an important question concerning the integrity of the criminal process that has been decided in conflicting ways by several of the Circuit Courts of Appeals. Petitioner respectfully requests this Court to grant certiorari in order to resolve this significant issue relating to a criminal defendant's right to the unwavering loyalty of his or her defense attorney.

Respectfully submitted,

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